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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

JOHN COE,

Petitioner,

v.

COUNTY OF COOK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT J. DARGIS
Counsel of Record

RICHARD F. MALLEN & ASSOC., LTD.
188 WEST RANDOLPH STREET
SUITE 1750
CHICAGO, IL 60601
(312) 346-0500

Attorneys for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

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QUESTION PRESENTED

Would the recognition of a father's claim for monetary damages against a government hospital under the Civil Rights Act for interference with the father's fundamental right to procreate resulting from an abortion constitute an undue burden on a woman's fundamental right to an abortion?

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The United States Court of Appeals for the Seventh Circuit issued its published opinion December 4, 1998. It is reported at 162 F. 3d 491 (7th Cir., 1998), 1998 WL 839090. It is included in the Appendix. Appendix A. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, which was entered December 22, 1997, is not published. It can be found at 1997 U.S. Dist. Lexis 20744. A copy of this opinion is included in the Appendix. Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was decided and issued December 4, 1998. Appendix A. No Petition for rehearing was filed. This Petition for Writ of Certiorari is being filed within 90 days of the issuance of the Seventh Circuit's opinion. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. Const. amend. XIV, Sec. 1

> Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- 42 U.S.C. Sec. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

- 740 ILCS 180/2.2 **Fetal Death - Cause of Action**

The state of gestation or development of a human being when an injury is caused, when an injury takes effect, or at death, shall not foreclose maintenance of any cause of action under the law of this State arising from the death of a human being caused by wrongful act, neglect or default.

There shall be no cause of action against a physician or a medical institution for the wrongful death of a fetus caused by an abortion where the abortion was permitted by law and the requisite consent was lawfully

given. Provided, however, that a cause of action is not prohibited where the fetus is live-born but subsequently dies.

There shall be no cause of action against a physician or medical institution for the wrongful death of a fetus based on the alleged misconduct of the physician or medical institution where the defendant did not know and, under the applicable standard of good medical care, had no medical reason to know of the pregnancy of the mother of the fetus.

- 750 ILCS 45/1.1 **Public Policy**

Public Policy. Illinois recognizes the right of every child to the physical, mental, emotional and monetary support of his or her parents under this Act.

- 750 ILCS 45/3 **Relationship and support not dependent on marriage**

Relationship and support not dependent on marriage. The parent and child relationship, including support obligations, extends equally to every child and to every parent, regardless of the marital status of the parents.

STATEMENT OF THE CASE

The Defendant in this action, County of Cook, owns and operates Cook County Hospital.[1] During 1992, the County Board President ordered the hospital director to form a task force to develop a plan to restore the performance of elective abortions at Cook County Hospital, which had previously been discontinued. The task force recommended the establishment of a "voluntary interruption of pregnancy program" for County Hospital and provided guidelines for elective abortions to be performed during the first and second trimester of pregnancy. The County Board President then issued executive order 92-1, requiring the medical director of the Hospital to implement the task force recommendations. Appendix C, p. 40a. Neither the task force recommendations nor the executive order contained any provision requiring prior notice to, or the consent of, the fathers whose children would be aborted at County Hospital. Nor was there any provision allowing for or requiring any type of judicial or administrative hearing where the father's interests would be represented. Appendix C, p. 41a. Pursuant to the recommendations and executive order, the County again began performing abortions at the hospital during September, 1992. Appendix C, p. 41a. The recommendations and executive order embody the municipal policy, custom and practice of which the plaintiff complains. Appendix C, pp. 41a, par.13, 44a, par.20.

The petitioner, John Coe, at all times relevant to this

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[1] This case is presented to this court following the affirmance of the dismissal of plaintiff's complaint for failure to state a claim under F.R.C.P. 12(b)(6). Accordingly, all of the facts set forth herein are taken from plaintiff's complaint. (Appendix C).

action, was a male of majority age. He and Jane Doe were the parents of one living child. The Plaintiff and Jane Doe were identified in the complaint by pseudonyms to protect their privacy. They were not married. Appendix C, pp. 37a, par.4, 41a, par.14. Jane Doe became pregnant with a second child fathered by the Plaintiff, but aborted that child at Cook County Hospital in September, 1995, pursuant to the hospital's policy. Appendix C, pp. 41a, par. 14. John Coe did not know that Jane Doe would obtain the abortion, had no notice the abortion would take place from any person, and never consented to the abortion. Appendix C, pp. 41a, 42a. Had he been notified of the abortion, plaintiff would not have given his consent. Appendix C, p. 42a. The exact gestational age of the aborted fetus was unknown to plaintiff, although it was most probably non-viable. Appendix C, p. 41a.

Plaintiff filed a class action complaint in Federal District Court for the Northern District of Illinois seeking monetary damages on behalf of a class of fathers whose fetuses were aborted at Cook County Hospital since 1992. The jurisdiction of the Federal District Court was invoked pursuant to 28 U.S.C. Sections 1331 and 1343. The complaint was premised upon 42 U.S.C. Sec. 1983 for violation of the plaintiff's constitutional rights as secured by and through the Fourteenth Amendment to the United States Constitution. Appendix C, p. 37a. Plaintiff sought to impose liability upon the County under Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Plaintiff alleged that by failing to notify the fathers and obtain their consent prior to aborting their children, the County violated the fathers' fundamental right to procreate and thereby denied the fathers' substantive due process. Appendix C, p. 42a, par. 16. Plaintiff also alleged that over

2000 abortions have been performed each year at County Hospital since 1992. Appendix C, p. 38a.

The County moved to dismiss the complaint pursuant to F.R.C.P. 12(b)(6) for failure to state a claim upon which relief may be granted. The District Court granted the motion. See Order, Appendix B. Plaintiff appealed to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the dismissal of the complaint and issued its published opinion on December 4, 1998. See Opinion, Appendix A.

REASONS FOR GRANTING THE WRIT

I. Under existing Supreme Court Precedent there is an irreconcilable conflict between a man's procreative right and a pregnant woman's procreative right when any Hospital or clinic acting under color of law is performing any abortion without notice to the father.

Typically, the focus of Supreme Court abortion related opinions is upon defining the limits to which the state may hinder or burden a woman's right to an abortion. Until now, state and local governments usually assumed the role of protecting fetal life, with this court balancing this state interest against a woman's liberty interest in her procreative rights. This court has never had the opportunity to evaluate the role or interests inherent upon the state when the government is in the position of taking fetal life, rather than protecting it. Nor has this court ever defined or considered what interest an individual father has in his developing fetus. If allowed to stand, the Seventh Circuit opinion in this matter will establish that a father has no interest in his developing fetus, and, perhaps, as long as a Government agent has the mother's consent for an abortion, no limit on a state actor in the taking of fetal life.

From this Court's decision in Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110, 86 L.Ed. 1655 (1942), it has long been recognized that a man has a fundamental right to procreate. When an arm of the State aborts a fetus without the father's knowledge or consent, and against his wishes, the Government is unquestionably interfering with that right. The rulings of the lower courts in this case effectively eviscerate the meaning of Skinner and render a man's right to procreate totally meaningless and unenforceable in the name of a

women's right to abort, even though a woman has no fundamental right to a publicly funded abortion. Webster v. Reproductive Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L.Ed.2d 410 (1989).

At the very heart of this case lies the conflict between men's and women's procreative rights in the context of a governmentally induced abortion. Although it mischarecterized the nature of the man's and woman's rights at issue in this case, the Seventh Circuit acknowledged this inherent conflict when it stated:

> ... we do not see how, as a matter of either legal logic or common sense, the constitutional right of a woman to have an abortion without interference from the man who impregnated her can coexist with a constitutional right of the man to interfere. Appendix A, p. 4a.

A woman is not constitutionally guaranteed an abortion without interference from the man who impregnated her. The woman's right which is constitutionally protected under Roe is the right to decide to terminate a pregnancy free of undue interference by the State. See, Planned Parenthood of Southeast Pennsylvania, v. Casey, 505 U.S. 833, 887, 112 S. Ct. 2791, 2826, 120 L. Ed. 2d 674, 721 (1992) (O'Connor, S.).

Further, Petitioner did not file suit seeking an injunction prohibiting the hospital from aborting his fetus. He filed suit to recover monetary damages after his constitutional rights were violated by the County when the County aborted his child against his wishes. As will later be demonstrated, recognizing a man's claim against the County would not constitute an "undue burden" of a woman's right to abort as

established under Roe. For, as this court noted:

> The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family.

Planned Parenthood of Southeast Pennsylvania, v. Casey, 505 U.S. 833, 898 (1992) (O'Connor, S.).

Just as a potential mother has a fundamental right to be free from the effects of an unwanted governmentally induced abortion, See, Arnold v. Board of Education of Escambia County, 880 F.2d 305 (11th Cir., 1989), so should a potential father.

More than 12,000 abortions have taken place at this single municipal hospital since abortions were resumed in 1992. It is currently unknown how many other public or government hospitals across the nation are also performing abortions without paternal notice or consent. Further, the extent of this constitutional deprivation as to the fathers is not limited only to hospitals or clinics run directly by state or local government. Private clinics or hospitals that are performing abortions without paternal consent may also be deemed to be acting under color of law.[2] These quasi-public

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[2] A private entity may be deemed to act "under color law" if there is a sufficiently close nexus between the State and the challenged action of the private entity. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S. Ct. 449, 42 L.Ed.2d 477 (1974). See, Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638 (4th Cir., 1975) (class action for declaratory relief against enforcement of medical center policy prohibiting all but lifesaving

hospitals are also violating the constitutional rights of men. Because abortion procedures and reporting requirements are generally highly regulated by most states, and because many private hospitals and clinics receive some form of federal or state funding, the implications of this case loom large and extend beyond hospitals or clinics that are run directly by a unit of local government.

It is inescapable that some men and women will forever be in conflict over when, or whether, they should have children. As long as the current constellation of Supreme Court cases remains the law of the land, the legal conflicts and inconsistences in the law which are represented in this case will continue, at least as long as a state actor chooses to become involved in any procreative act or decision of a private individual.

A. An unmarried father has a cause of action under the Civil Rights Act for monetary damages against a government hospital when the hospital fails to notify the father and obtain his consent before performing an abortion.

In determining whether a father has a liberty interest in a developing fetus, the initial question in the analysis is whether there is any societal or historical tradition pertaining to the protection, or the denial of protection, of a natural father's interest in his developing fetus. Michael H. and Victoria D. v. Gerald D., 491 U.S. 110, 127, n. 6, 109 S. Ct.

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abortions upheld as medical center was deemed to be acting "under color of law".). See, also, cases collected at 24 A.L.R. Fed. 463 (1979), Action of private hospital as State action under 42 U.S.C. Sec. 1983 or Fourteenth Amendment.

2333, 105 L.Ed. 2d 91 (1989) . There is no long standing tradition pertaining to these paternal interests because abortion did not become wide spread in the United States until the States were forced to legalize it 26 years ago with this Court's decision in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed. 2d 147 (1973). Prior to Roe, only a few states allowed abortions. Twenty six years is hardly any time for a tradition to develop in this regard, one way or the other. [3] Because there is no such long standing tradition, the next step in Justice Scalia's analysis requires that the court "... consult, and (if possible) reason from, the traditions regarding natural fathers in general." Michael H. and Victoria D. v. Gerald D., 491 U.S. 110, 127, N. 6. This second step of the analysis is also in accord with the analysis of the approach taken by Justices O'Connor and Kennedy. See, Michael H., 491 U.S. at 132. Reasoning from the traditions regarding natural fathers in general, one can only conclude that a man has a liberty interest in his developing fetus.

Since as early as this court's decision in Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L.Ed. 1042 (1923) the right to conceive and to raise one's child has been deemed "essential". In Skinner v. Oklahoma, 316 U.S. 535 (1942), a man's right to procreate was declared fundamental. In Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 , 14 L.Ed.2d 510 (1965) it was determined that a natural corollary of the right to procreate was a fundamental right not to procreate. When this court extended the right of married couples to use contraceptives established in Griswold to

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[3] To the extent there is a tradition in this regard, it is perhaps reflected in Justice O'Connor's statement that the vast majority of woman notify their male partners of their decision to obtain an abortion. Casey, 505 U.S. at 892.

unmarried persons, it was stated:

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S. Ct. 1029, 31 L.Ed. 2d 349 (emphasis in original).

When this court determined in Danforth and Casey that the states could not enact legislation requiring paternal notice or consent before performing an abortion as violative of the precepts of Roe, it was also recognized that a husband had some interest in his developing fetus. See, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 69, 96 S. Ct. 2831, 49 L. Ed.2d 788 (1976); (We recognize that a husband has a "deep and proper concern and interest ... in his wife's pregnancy and in the growth and development of the fetus she is carrying") Planned Parenthood of Southeast Pennsylvania, v. Casey, 505 U.S. 833, 895-96 (1992).

Further, neither is the judicial demarcation line of fetal viability determinative of the nature of the father's claim and interest in the fetus. First, the State's general interest in fetal life is manifestly different from an individual father's interest in his developing child. For the court to determine that a father has no interest in his developing child until the point of viability would be to equate the State's interest in the fetus to that of the father. Danforth and Casey made it clear that a father's interest may not be utilized by the State to justify interference with a women's right to abort under Roe. The lower court opinions in this case violate this basic precept of

Casey and Danforth, for, if a father's interest may not be utilized by the state to justify interference with a mother's reproductive rights, then neither can a mother's interest be utilized by a state actor (the County) to justify interference with the father's reproductive rights. While the State's interest in the fetus might become compelling at the point of viability, a father's fundamental interest in the fetus begins at the point of conception, just as the mother's. Surely, a women's right to be free from the effects of an abortion induced or coerced by the State as in Arnold v. Board of Education of Escambia County, 880 F.2d 305 (11th Cir., 1989) (cited approvingly by this court in Planned Parenthood of Southeast Pennsylvania, v. Casey, 505 U.S. 833, 895-96 (1992)) would not depend upon fetal viability. Neither, then, should the father's.

The fact that the plaintiff in this case was unmarried also does not mean that he has no interest in his developing fetus. As Justice Scalia stated in Michael H.:

> The family unit accorded traditional respect in our society, which we have referred to as the "unitary family", is typified, of course, by the marital family, *but also includes the household of unmarried parents and their children*.

Michael H., 491 U.S. 110, 123, N. 3. (Emphasis supplied).

In 1972, the Court solidified a biological father's interest in the companionship, care and custody of his illegitimately conceived child in Stanley v. Illinois, 405 U.S. 645, 658, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972), when it held that the state must hold a hearing to determine an illegitimate father's fitness before terminating his parental

rights.

There can be no doubt there is a strong societal tradition imposing substantial legal obligations, and some legal advantages, upon unmarried fathers. For instance, in Illinois, a biological father is statutorily required to supply physical, mental, emotional, and monetary support to his children. 750 ILCS 45/1.1. He is required to financially support his children, regardless of marital status. 750 ILCS 45/3. When a biological father's consent is not obtained prior to an adoption, even the best interests of the child may yield to those of the father. In Re Doe, 159 Ill.2d 347, 638 N.E.2d 181 (1994). Usually, men may only be absolved of their parental duties if they consent to their child's adoption, but even this may not relieve them of future support obligations. Dwyer v. Dwyer, 366 Ill. 630, 10 N.E.2d 344, 346 (1937). Finally, in Illinois, a biological father has the constitutional right to bring a wrongful death claim on behalf of his unborn fetus and inherit the proceeds, regardless of the gestational age of the fetus. 740 ILCS 180/2.2; Estate of Hicks, 174 Ill.2d 433, 675 N.E.2d 89 (1996). Because the Law provides individuals with equal protection on the basis of gender in the adoption, alimony, child custody and child support settings, as a matter of consistency it should provide equal protection in pro-creational choices and decision making as well.

From these cases, and the obligations the law places upon unmarried fathers, one can only conclude that an unmarried man has a liberty interest in his developing fetus, beginning at the point of conception, which the government may not interfere with absent a compelling state interest.[4]

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[4] While the Seventh Circuit never specifically addressed the issue of whether an unmarried father possesses a liberty interest in

When the District Court undertook the legal analysis required by the facts of this case (strict scrutiny) it was understandably problematic for the court to formulate a compelling state interest which would justify the County's policy, as the County itself asserted no compelling state interest in either the District Court or the Appellate Court. Appendix B, p. 27a, N.5. It was also problematic for the lower courts because there simply is no compelling state interest which justifies this interference with a man's fundamental right to procreate. After assuming that plaintiff had a liberty interest in his developing fetus, (Appendix B, p. 26a) the District Court then determined that the County had a compelling state interest " ... to assist pregnant women in exercising their recognized liberty interest in choosing whether to terminate their pregnancy." Appendix B. p. 28a. This amounts to nothing more, nor less, than a compelling state interest in birth control, or a compelling state interest in the destruction of fetal life. Since there is no compelling state interest in the preservation of fetal life prior to viability (Roe) it is difficult to comprehend how there can be a compelling state interest in the termination of fetal life. As was aptly noted by Justice Stevens:

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his developing fetus, the Seventh Circuit also never addressed an issue of Illinois Constitutional Law which would require the court to apply strict scrutiny even absent this fundamental liberty interest in the context of petitioner's equal protection claim. See, Estate of Hicks, 174 Ill.2d. 433, 675 N.E.2d 89 (1996) (under the Illinois Constitution a classification based upon gender is deemed a suspect classification which must withstand strict scrutiny).

> "[A] state interest in population control could not justify a state-imposed limitation on family size or, for that matter, state-mandated abortions". Casey, 505 U.S. 833, 915, N.3. (Stevens, J., concurring in part).

But through its policy the County has mandated an abortion, at least as to the father.

Even assuming that there is a compelling state interest of some sort to "assist" a mother with her abortion, the policy in question (complete exclusion of all fathers) is neither necessary to promote such an interest nor is it narrowly enough drawn. The County never explained, nor did the lower courts, how the policy of excluding all fathers from the decision to abort promotes the presumed state interest of "assisting the mother in exercising her fundamental reproductive right". Notification of the fathers would not, in and of itself, prevent a mother from exercising her fundamental reproductive right to abort her child. Many fathers may just as soon consent to an abortion, or simply do nothing if notified. When Justice O'Connor analyzed the lower court's findings in Casey, she noted that "The vast majority of women notify their male partners of their decision to obtain an abortion." Casey, 505 U.S. 833, 892. It may also happen that once a father is notified, the mother might decide not to go through with the abortion, which would equally assist the mother in the exercise of her fundamental rights. If most fathers are notified in any event, and some fathers would likely also "assist" a woman in the exercise of her rights, what justification is there for excluding all fathers? Petitioner submits there is none. The least restrictive means simply would not exclude all fathers. A policy calling for paternal "consultation" would more narrowly achieve the County's purpose, whatever that purpose might be.

With all due respect for the lower courts, the question is not whether a compelling private interest exists, but what compelling state interest is served by completely excluding the fathers from this most fundamental aspect of life. Using the district court's own analysis, assuming there is some broad compelling state interest to "assist" the mother with an abortion, which somehow stems from the mother's fundamental interest, it should logically follow that there is, in fact, a fundamental right to a publicly funded abortion. But clearly there is no such fundamental right. Webster v. Reproductive Services, 492 U.S. 490 (1989). Accordingly, there can be no such compelling state interest. Petitioner submits that even if the less exacting "rational relation" or "intermediate" standards of review were applied to the County's policy in the instant case, the policy would fail these tests as well. There is no legitimate governmental interest served by failing to notify a potential father and obtain his consent before aborting his fetus.

Because a man has a liberty interest in his developing fetus, and there is no narrowly tailored compelling state interest justifying interference with this interest, the father's claim against the hospital must prevail.

As previously stated, the Seventh Circuit never addressed the issue of whether a father has a liberty interest in his developing fetus, and, therefore, had no occasion to evaluate the compelling state interest formulated by the District Court. Neither did the Court of Appeals articulate any compelling State interest of its own formulation. Rather, the Seventh Circuit's opinion focused on the issue now presented to this court, whether recognizing this cause of action on behalf of the fathers would constitute an undue burden on a woman's right to an abortion before viability. The Seventh Circuit clearly erred with its simplistic analysis

in an effort to avoid the conflict presented in the context of this case by Skinner, Roe and Webster.

B. Recognition of a man's right to sue a Government abortionist for monetary damages under the Civil Rights Act would not constitute an undue burden on a woman's right to an abortion.

Under the standard enunciated by the court in Casey, it must be determined whether the recognition of a man's right to sue for monetary damages would create an "undue burden" upon a woman's right to have an abortion. See, Planned Parenthood of Southeast Pennsylvania, v. Casey, 505 U.S. 833 (1992). As the Seventh Circuit was required to acknowledge, (Appendix A, pp. 2a-3a) women possess no fundamental right to a publicly funded abortion under Webster v. Reproductive Services, 492 U.S. 490 (1989). Because men clearly have a fundamental right to procreate and parent a child, a man's legal interest in his child actually outweighs a woman's right to an abortion when the county is performing the abortion.

Even though the plaintiff sought no injunctive relief, the court of Appeals repeatedly treated plaintiff's claim as though the claim was directly interfering with a woman's fundamental right to an abortion.[5] In its final analysis, the Seventh Circuit simply weighed the man's interest in potential

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[5] ... "all the abortions that Coe wishes to impede ..." (Op., Appendix A, p. 2a); "... accede to Coe's demand that it stop performing abortions..." (Op., Appendix A, p. 3a); "... a constitutional right of the man to interfere." (Op., Appendix A, p. 4a); "Illinois neither could nor purports to give him a right to block such an abortion." (Op., Appendix A, p. 11a).

paternity against the woman's interest in her reproductive freedom and determined that the man's claim against the County failed. Appendix A, p. 5a. The court so ruled, even though a woman has no fundamental right to a publicly funded abortion under Webster. Because the Court of Appeals weighed these private interests when it should have simply weighed the father's interest against that of the County, the Appellate Court implicitly determined that the recognition of the father's cause of action against the County would place an undue burden on a woman's right to abort prior to viability. The Court of Appeals was wrong.

First, as a matter of legal and proximate causation, requiring an abortionist to pay monetary damages to the father of an aborted fetus after the fact does not and could not place a "substantial obstacle" in the path of the woman seeking an abortion because the abortion has already taken place.

Secondly, the threat of future damage awards against the county can not be considered a "substantial obstacle" to any future woman's right to obtain an abortion at County hospital. By virtue of Webster, the County is free to place any condition upon women who might seek abortions at County Hospital, including the requirement that they notify the fathers. See, Seventh Circuit Opinion, Appendix A, p. 2a-3a. If the men's claim for damages were recognized, the County might then modify its policy to require paternal notification before providing a municipally funded abortion. Women who refuse to notify the father would then have to go to a private hospital or clinic. The County might even halt abortions all together. But this would still only mean that some women would have to go elsewhere. This may present a financial burden to some women, but this is hardly the "substantial obstacle" contemplated by Casey. Further, as demonstrated by the Supreme Court opinions on publicly

funded abortions, See, Maher v. Roe, 432 U.S. 464, 97 S. Ct. 2376, 53 L.Ed.2d 484 (1977) and Webster v. Reproductive Services, 492 U.S. 490 (1989), merely instituting procedural requirements, or even limiting public funds for abortion services, does not unduly interfere with a woman's right to an abortion, because the denial of public funds or services places indigent women in no worse position than they otherwise would have been. Maher, 432 U.S. at 474; Webster, 492 U.S. at 509-10.

Finally, there is no threat of any potential judgment against the women who obtain abortions prior to viability because, as the Seventh Circuit noted, their conduct is privileged under Roe v. Wade. See, Seventh Circuit opinion, Appendix A, p. 2a. While individual women are therefore immune from suit by their husbands or the unmarried men who impregnated them, municipal entities, such as the County in this case, are not. Under Owen v. City of Independence, Mo., 445 U.S. 622, 100 S. Ct. 1398, 63 L.Ed. 2d 673 (1980), municipal entities are not entitled to assert the defense of Qualified Immunity. The same reasoning that required the holding in Owen, also mandates the conclusion that municipal entities are not entitled to assert that their conduct in performing abortions is privileged. Privileges are of generally two types, absolute or conditional. There is nothing to suggest that the public interest in having County Hospital perform abortions is so overwhelming that an absolute privilege would apply to either the mother or the County. If any privilege does apply it must, therefore, be conditional. With any conditional privilege, there must always be present an element of good faith. Under Owen, good faith is not a defense which the County may assert. Further, just as the Court found in Owen that there is no tradition of immunity for municipal corporations, neither is there any tradition of privileged conduct for municipal corporations. Accordingly,

while a woman who obtains an abortion is immune from suit, the County is not.

Accordingly, because the recognition of this cause of action would not constitute an undue burden on a woman's right to an abortion, the court must apply a rational relation analysis, not strict scrutiny. Allowing a man a claim against the hospital that aborts his fetus certainly serves the legitimate government purpose of allowing a remedy for a constitutional deprivation. As Maher and Webster demonstrate, while the state may not throw obstacles directly in the path of a woman's fundamental right to an abortion, the state need not aid its citizens' pursuit thereof by providing government funding for them. Allowing men to retroactively sue for the deprivation of their constitutional rights related to the abortion of their children at County Hospital is not a substantial obstacle placed in the path of women who seek abortions in general.

CONCLUSION

A man has a fundamental liberty interest in his developing fetus from the point of conception and a claim for monetary damages against the government entity that interferes with that interest by aborting his fetus without his consent. The County has no compelling state interest which justifies this interference. Recognizing a father's claim and giving effect to his right to procreate would not constitute an undue burden on a woman's right to procure an abortion.

When a governmental entity is performing an abortion there is an inherent conflict between a man's procreative right under Skinner and a woman's right to abort under Roe, as modified by Webster. The unique interplay of the law pertaining to municipal liability under 42 U.S.C. Section 1983

and the fundamental rights that are at stake in this case require Supreme Court review and intervention. If allowed to stand, the Seventh Circuit opinion will mean that the fundamental rights of countless men will continue to be trampled. This court should grant CERTIORARI to review this case and revisit the court's earlier rulings defining procreative rights.

Date: February 24, 1999

Respectfully submitted,

/s/_____
ROBERT J. DARGIS
Counsel of Record

Richard F. Mallen and
Associates, Ltd.
188 West Randolph Street
Suite 1750
Chicago, Illinois 60601
(312) 346-0500

Attorneys for Petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-1164

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

JOHN COE, individually, on behalf of Infant Coe, and on behalf of all others similarly situated to John Coe) and all others similarly situated to Infant Coe,
Plaintiff-Appellant,

v.

COUNTY OF COOK, et al.,
Defendants-Appellees.

[FILED Dec. 4, 1998]

Before POSNER, Chief Judge, and CUMMINGS and DIANE P. WOOD, Circuit Judges.

POSNER, Chief Judge. Cook County, Illinois, owns the Cook County Hospital, which caters primarily to what used to be called "charity" patients; it does not turn away

patients on the ground of inability to pay. In 1992 the County issued guidelines for the performance of abortions at the hospital. The guidelines track the Supreme Court's current views on the permissible scope of state regulation of abortions, and thus do not require notice to or the consent of the father of a fetus that the mother wants to abort. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 887-98 (1992). In 1995, a woman whom the plaintiff John Coe (a pseudonym) had impregnated, but to whom he was not married, had an abortion at the Cook County Hospital, and Coe was not notified. In this suit for damages under 42 U.S.C. § 1983, Coe argues that the hospital's policy of performing abortions without notice to and other safeguards for fathers in his position violates his federal constitutional and state statutory rights and those of the aborted fetuses, on whose behalf the suit is also brought. The district court dismissed Coe's federal claims under Fed. R. Civ. P. 12(b)(6) and then relinquished jurisdiction over his state-law claims under 28 U.S.C. § 1367(c)(3).

So far as appears, all the abortions that Coe wishes to impede are privileged by the Supreme Court's decisions defining the constitutional right of abortion, in the sense that a state could not forbid these abortions; for Coe does not know the age of "his" fetus when it was aborted, and the mother's right to abort a fetus that has not yet become viable is essentially absolute. Since, however, Cook County Hospital is not required to perform abortions at all (it did not do so for a period ending with the adoption of the challenged guidelines), we may assume without having to decide that it could limit itself to performing a subset of privileged abortions — that it could, for example, tell women that if they want an abortion at Cook County Hospital they must

agree to notification of the father — since their is no constitutional right to obtain any abortion at public expense. *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991); *Webster v. Reproductive Health Services*, 492 U.S. 490, 511 (1989); *Harris v. McRae*, 448 U.S. 297, 325 (1980); *Poelker v. Doe*, 432 U.S. 519, 521 (1977); *Maher v. Roe*, 432 U.S. 464, 474 (1977). That is, we may assume that it would not be unconstitutional for Cook County Hospital to accede to Coe's demand that it stop performing abortions of which the fathers have no notice. Whether that demand has any constitutional backing is a separate question; the only point we are making now is that the constitutional right to abortion does not automatically cut off Coe's claim.

We are mindful that in constitutional law the greater power does not always include the lesser. The power of Cook County Hospital to discontinue all abortions does not *necessarily* entail a power to discontinue just those abortions of which the fathers are not notified. The fact that the government could abolish the postal service and make the carriage of mail an entirely private activity would not entitle it to detain mail containing "communist propaganda." *Lamont v. Postmaster General*, 381 U.S. 301 (1965); see also *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 674-75 (1996); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). But that is because the effect of granting such an entitlement would be to impair the market in ideas or opinions. It would have this effect because of the lack of good substitutes for postal service (especially back when *Lamont* was decided) and because of the unlikelihood that the service would be privatized in response to a ruling protecting the mailing of communist propaganda. It is not at all clear that permitting Cook County Hospital to pick and choose among abortions

would burden the right to an abortion as much as permitting the postal service to censor mail would burden the right of free speech. For if Cook County Hospital were forbidden to impose a notification requirement, it might very well decide, as it would have a perfect right to do, to perform no abortions at all — which was in fact its policy before 1992. In that event, forbidding it to pick and choose would be a Pyrrhic victory for women seeking abortions. Cf. *Chicago Acorn v. Metropolitan Pier & Exposition Authority*, 150 F.3d 695, 704 (7th Cir. 1998). Forbidding the postal service to censor communist propaganda was not a Pyrrhic victory for free-speech advocates because it was out of the question that the government would respond by getting out of the mail business, with the consequence that all mail would be carried by private carriers who would be free to censor communist propaganda because the First Amendment does not constrain private conduct.

We need not pursue this issue of unconstitutional conditions." Whatever the rights of the hospital are, we do not see how, as a matter of either legal logic or common sense, the constitutional right of a woman to have an abortion without interference from the man who impregnated her can coexist with a constitutional right of the man to interfere. Although the cases do recognize family relations as a form of "liberty" within the meaning of the due process clauses, e.g., *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Ellis v. Hamilton*, 669 F.2d 510, 512-14 (7th Cir. 1982), they have refused to extend this recognition to the bare biological relation between father and child, *Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110, 123-30 (1989) (plurality opinion); *Pena v. Mattox*, 84 F.3d 894, 899-900 (7th Cir. 1996);

Crumpton v. Gates, 947 F.2d 1418 (9th Cir. 1991), let alone to the relation between a father and a fetus. But even if they would take this large step, perhaps in a case in which the father could prove that he would have established a loving and intimate relationship — a family relationship in the fullest sense — with the child that the fetus would have become if not aborted, Coe would lose. In establishing the constitutional right of a woman to have an abortion without having to notify the father, the Supreme Court necessarily as well as explicitly weighed the woman's interest in reproductive freedom against the man's interest in potential paternity, and found the former interest to be the weightier. *Planned Parenthood of Southeastern Pennsylvania v. Casey, supra,* 505 U.S. at 896; *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 71 (1976). "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two [the man and the woman], the balance weighs in her favor." *Id.* Coe envisages a situation in which a woman has a right to have an abortion at a private hospital without notifying the father — since the State of Illinois and its subdivisions could not constitutionally impose such a requirement — but is constitutionally debarred from having such an abortion at a public hospital. If a father's right to notice had the constitutional heft that Coe believes it has, it would have been irrational for the Supreme Court to forbid the states to require such notice of private hospitals.

Indeed, Coe's argument implies, though he does not contend, that it is unconstitutional for a public hospital to perform *any* abortions. Since no woman has a constitutional right to have an abortion at public expense, or in a public hospital, the only constitutional interest in play in this case, in

Coe's view, is the interest (however attenuated) of the father, and perhaps the fetus, in the fetus's survival. It is true that because the Constitution in general constrains only state action, the same acts that are prohibited to the state may be permitted to private entities. What is unusual is the implication of Coe's argument that conduct which the Constitution forbids to states is the very conduct that the Constitution forbids the states to prohibit private persons from engaging in. Unusual; not unprecedented. A state can neither forbid nor endorse religion and can neither censor nor forbid private "censorship" (for example, a newspaper's exercise of editorial judgment). But that is because either form of intervention in the religious or speech realms impairs weighty constitutional values. The father's interest in the survival of his fetus has not been deemed such a value. If it were, it would entitle the states to impose a notification requirement on private as well as public hospitals and abortion clinics.

And again, if the fetus's right to life, which Coe seeks to represent, were deemed to outweigh the pregnant woman's interest in being allowed to make the choice for abortion without being impeded by the father of the fetus (here not even the husband), the Supreme Court would not have forbidden the states to require such notification. And anyway the life, liberty, and property that the due process clauses protected are rights of persons, and the courts have decided that a fetus is not a person within the meaning of these clauses. *Roe v. Wade*, 410 U.S. 113, 158 (1973); *Reed v. Gardner*, 986 F.2d 1122, 1128 (7th Cir. 1993); *Alexander v. Whitman*, 114 F.3d 1392, 1400 (3d Cir. 1997); *Crumpton v. Gates, supra*, 947 F.2d at 1421; *Planned Parenthood of Southeastern Pennsylvania v. Casey, supra*, 505 U.S. at 913 (concurring opinion). This conclusion follows inevitably

from the decision to grant women a right to abort. If even a first-trimester fetus is a person, surely the state would be allowed to protect him from being killed, at least if the mother's life would not be endangered by forbidding the abortion. But of course the state is not allowed to do this.

Coe argues that certain rights (of which more later) that Illinois confers on fetuses are enforceable in federal court by virtue of 42 U.S.C. § 1988, which so far as relevant here allows federal courts in suits under section 1983 to borrow remedies from state law. *Robertson v. Wegmann*, 436 U.S. 584, 588-90 (1978); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1234 (7th Cir. 1984); *Coyne-Delany Co. v. Capital Development Board*, 717 F.2d 385, 394 (7th Cir. 1983). Remedies, not rights. *Moor v. County of Alameda*, 411 U.S. 693, 703-04 (1973). Otherwise section 1988 would undo the limits that the courts have placed on the federalization under section 1983 of rights conferred by state law. In *Paul v. Davis*, 424 U.S. 693, 711-12 (1976), the Court held that the interest in reputation that is protected by state defamation law is not protected by the Constitution, and so defamation by state employees is not actionable under section 1983. If Coe's interpretation of section 1988 is right, *Paul v. Davis* and a myriad of like cases illustrated by *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 202 (1989); *Baker v. McCollan*, 443 U.S. 137, 146 (1979), and *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), are wrong, because under that interpretation any right under state law against a state's agencies or employees is enforceable in a federal suit based upon section 1983.

Coe argues in the alternative that the Cook County Hospital's abortion guidelines are unconstitutionally vague

because they permit second-trimester abortions on the basis of "a severe fetal anomaly." If the term is really vague, it is conceivable though unlikely that some fetuses that their mothers do not have a constitutional right to abort without parental notification may nevertheless be aborted without such notification. It is unlikely because Illinois abortion law, to which the hospital is fully subject so far as that law is constitutional, goes up to the constitutional limit in preventing abortions. See 720 ILCS 510/1 (statement of legislative intention). The hospital is forbidden to perform abortions not privileged by the Constitution. But even if the hospital has left the safe harbor created by the Supreme Court's decisions and is performing abortions to which women have no right, and even if in doing so it is stepping on the rights of men in the fetuses whom they father (if there are such rights), Coe cannot prevail. And this for several reasons.

First, he has no right to complain about the vagueness of the guideline. Statutes and other enactments present a constitutional issue of vagueness when they deter constitutionally protected activity, fail to provide even minimum guidance as to people's legal obligations, or give law enforcers excessive discretion that might be exercised in arbitrary or invidious ways. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Planned Parenthood of Wisconsin v. Doyle*, No. 98-2521, 1998 WL 787360, at *6 (7th Cir. Nov. 3, 1998); *Kucharek v. Hanaway*, 902 F.2d 513, 518 (7th Cir. 1990). The complaint invariably is about the impropriety of punishing a person for violating a vague statute or regulation. We cannot find a case in which an enactment was challenged as vague merely because it failed to prohibit activity (here some abortions) that harmed the

plaintiff. Anyway it is not the guideline's vagueness that bothers Coe but the fact that the guideline does not clearly forbid abortions that may not be constitutionally privileged. If by performing these abortions physicians at Cook County Hospital are violating Coe's rights, he should have a remedy; but the guideline is neither here nor there. If the Constitution prohibits an activity, there is no constitutional requirement that the state prohibit it as well.

Second, Coe has not alleged that the fetus that he fathered is a second-trimester fetus, and so he has not shown that the alleged vagueness of the hospital's guidelines is a potential harm to him. *Village of Hoffman v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *Illinois Council on Long Term Care Inc. v. Shalala*, 143 F.3d 1072, 1077 (7th Cir. 1998); *Baer v. City of Wauwatosa*, 716 F.2d 1117, 1124 (7th Cir. 1983). Third, he has offered no argument or authority for deeming the term "severe fetal anomaly" vague. For all that appears, either it has a well-settled medical meaning, or it is as precise as the phenomenon that it seeks to identify permits. See *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971); *United States v. Petrillo*, 332 U.S. 1 5-8 (1947); *United States v. Soderna*, 82 F.3d 1370, 1376-77 (7th Cir. 1996); 1 Wayne R. LaFave & Austin W. Scott Jr., *Substantive Criminal Law* § 2.3, p. 133 (1986). It is true that Coe's suit was dismissed on a motion under Rule 12(b)(6), and so he had no opportunity to present evidence concerning the meaning or usage of the term. But at oral argument he acknowledged that he has no intention of presenting evidence or argument on the point, beyond the suggestion that the burden of showing that the phrase is not vague is on the defendants. That is not a tenable position, especially since, as we noted, the issue really isn't vagueness at all.

Plainly what we have in this case is an attempted end run around the Supreme Court's decisions recognizing a broader right of abortion than many people think legally or morally justifiable. These people are entitled to hold such a view, of course; but as it has no basis in federal law as authoritatively construed, the district judge had no choice but to grant the defendants' motion to dismiss the federal claims. And having dismissed them before trial, she naturally relinquished jurisdiction over the state-laws claim to the state court. See 28 U.S.C. § 1367(c)(3); *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 346, 351 (1988); *Marzuki v. AT&T Technologies, Inc.*, 878 F.2d 203, 206 n. 3 (7th Cir. 1989). Ordinarily that would be the end of the matter. But, as it happens, those claims are so entangled with the federal claims that the rejection of the latter probably entails rejection of the former as well. And when a state-law claim is clearly without merit, it invades no state interest — on the contrary, it spares overburdened state courts additional work that they do not want or need — for the federal court to dismiss the claim on the merits rather than invite a further, and futile, round of litigation in the state courts. *Sullivan v. Conway*, 157 F.3d 1092, 1095 (7th Cir. 1998); *Brazinski v. American Petroleum Additives Co.*, 6 F.3d 1176, 1182 (7th Cir. 1993).

The state-law issue is whether Cook County Hospital's refusal to notify the father of a fetus of an impending abortion violates any rights (the rights that Coe argues, unsuccessfully in our view, are federalized by 42 U.S.C. § 1988) conferred on fetuses by the statutory or common law of Illinois. Like most states, Illinois provides civil and criminal sanctions for injuring or killing fetuses. 720 ILCS 5/9-1.2, 2.1,3.2; 5/12-3.1, 4.4; 9/1.2, 2.1, 3.2; 12/3-1, 12/4.4; 740 ILCS 180/2.2. If you shoot and kill a pregnant woman, and the bullet causes

the death of the fetus as well, either directly or (as by cutting off the supply of oxygen from the mother) indirectly, you are guilty of feticide as well as murder and are subject to severe civil and criminal sanctions. *People v. Shoultz*, 682 N.E.2d 446 (Ill. App. 1997); *People v. Halmon*, 587 N.E.2d 1182 (Ill. App. 1992); *People v. Kuchan*, 579 N.E.2d 1054 (Ill. App. 1991). Obviously *Roe v. Wade* and the cases following it did not privilege such conduct. States remain free to punish feticide so long as they don't try to punish a woman who exercises her constitutional right to abort her fetus, the physician who performs the abortion, or the hospital or other facility, even if public, in which the abortion is performed. *People v. Shoultz, supra*, 682 N.E.2d at 448; cf. *Roe v. Wade, supra*, 410 U.S. at 162. Any attempt by a state to punish the exercise of a federal right is forbidden by the supremacy clause of the U.S. Constitution. And in fact the state statutes that Coe invokes make an explicit though, in light of the supremacy clause, a superfluous exception for a lawful abortion, which the abortion of Coe's fetus was even though Coe was not notified in advance. Illinois neither could nor purports to give him a right to block such an abortion.

But we are drawn up short by the rule in this court, enforced recently in a case quite like this — that is, a case in which it made sense to alter the judgment dismissing the plaintiff-appellant's suit from dismissal without prejudice to dismissal with prejudice — that the court of appeals lacks jurisdiction to enlarge a judgment in favor of the appellee unless the appellee has filed a cross-appeal. *Conover v. Lein*, 87 F.3d 905, 908 (7th Cir. 1996); see also *Tredway v. Farley*, 35 F.2d 288, 296 (7th Cir. 1994). The rule, when conceived of as being jurisdictional and therefore not waivable, has been criticized, not only by the Wright and Miller treatise, which

remarks the "astonishing lack of reasoned explanation" for it, 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3904, p. 206 (2d ed. 1991), but also by us. *Bullard v. Sercon Corp.*, 846 F.2d 463, 467-68 (7th Cir. 1988). A number of cases in other circuits hold that the rule is not jurisdictional and thus need not be applied rigidly. *Texport Oil Co. v. M/V Amolyntos*, 11 F.3d 361, 366 (2d Cir. 1993); *Pan-Pacific & Low Ball Cable Television Co. v. Pacific Union Co.*, 987 F.2d 594, 596 (9th Cir. 1993); *United States v. Tabor Court Realty Corp.*, 943 F.2d 335, 342-45 (3d Cir. 1992); *LaFaut v. Smith*, 834 F.2d 389, 394 n.9 (4th Cir. 1987); *Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 476 (8th Cir. 1977); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 33 (D.C. Cir. 1990); *Tug Raven v. Texler*, 419 F.2d 536, 548 (4th Cir. 1969).

Since the rule's only purpose is to notify the appellant that the appellee wants to alter and not merely defend the judgment of the district court, there is no compelling reason to enforce it when the appellant has been adequately notified of the appellee's intentions. Rigid enforcement of the rule is thus unnecessary, and has five consequences, all of which are bad. It makes federal law more complicated than it has to be. It increases paperwork, by requiring the appellee as well as the appellant to file a notice of appeal. It increases the number of remands, in cases in which the appellee is tripped up by the rule. It trips up the unwary, as may have happened in this case. And it multiplies the number of cross-appeals, because appellees frequently confuse defending a judgment on new grounds, which doesn't require a cross-appeal, with seeking to alter the judgment in their favor, which does. See, e.g., *Byron v. Clay*, 867 F.2d 1049, 1050-51 (7th Cir. 1989); *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 439 (7th Cir.

1987); 15A Wright, Miller & Cooper, *supra*, § 3904, p. 205.

It is high time that we abandoned the rule as a rule of jurisdiction. In this case, however, the appellees' brief did not give the appellant adequate notice of an intention to seek to alter the judgment in the appellees' favor. Their brief does say at one point that the state law claims *ought* to be dismissed with prejudice, but there is no request to us to alter the judgment accordingly. In this case, then, the requirement of filing a cross-appeal would have served a useful purpose in putting the appellant on his guard, and maybe he could have said something that would show that the state-law claims should be remanded to the state courts after all. We shall decline, then, to alter the judgment.

One issue remains to be considered. "John Coe" is a pseudonym (like the more familiar "John Doe"), and in the certificate of interest that a party is required to file in order to enable a judge of this court to determine whether he or she is recused from the case Coe's real name is not listed. It should be. See *Doe v. Doe*, 668 N.E.2d 1160, 1168 (Ill. App. 1996). Suppose it turned out that Coe was a close relative of one of the judges, and this was not discovered until after the case was decided. Even though the judge had not known this when hearing and deliberating on the case, the revelation would cast a shadow over the court's impartiality. The certificate should list the party's true name with a notation that the party is proceeding under a pseudonym. Disclosure of the party's true name should also be made in the district court so that the district judge can determine whether to recuse himself; and so far as we can determine that was not done either.

There is a deeper issue. We have criticized the overuse of pseudonyms in federal litigation, pointing out that the public has a right to know who is utilizing the federal courts that its tax dollars support. *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997). In a few cases a justified interest in privacy warrants concealment of a litigant's name. But not in most cases (including *Doe*) and not in this one. Mr. "Coe" may well feel embarrassed about having impregnated a woman to whom he was not married. But the embarrassment felt by a person who engages in immoral or irresponsible conduct is not a compelling basis for a waiver of the general rule that parties to federal litigation must litigate under their real names.

AFFIRMED.

A true Copy:

Teste: /s/_____
Clerk of the United States Court
of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 96 C 2636

JOHN COE, Individually on behalf of INFANT COE, and on behalf of ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

COUNTY OF COOK and RUTH ROTHSTEIN, Individually and in her official capacity as Director of the BUREAU OF HEALTH SERVICES,
Defendants.

FILED
Dec. 24, 1997

JUDGES: Blanche M. Manning, United States District Court Judge.

OPINION BY: Blanche M. Manning

MEMORANDUM OPINION AND ORDER

Plaintiff submits the instant five count complaint against defendants, the County of Cook ("County") and the director of its Bureau of Health Services, Ruth Rothstein ("Rothstein") seeking compensation, pursuant to 42 U.S.C. section 1983, for alleged violations of the Fourteenth Amendment, as well as alleging a pendant Illinois wrongful death claim. Defendants move, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss all counts. For the reasons set forth below, the defendants' motion is granted.

BACKGROUND

Following are the facts as set forth in the complaint. On June 16, 1992, a task force of health professionals formed by the County issued a report recommending that the County hospitals provide elective abortions during the first trimester of pregnancy, and provide abortions during the second trimester if either (1) the pregnancy resulted from rape or incest, or (2) the pregnancy is likely to result in the birth of a child with a severe fetal anomaly. On June 18, 1992, Cook County Board President Richard J. Phelan issued executive order 92-1 ("Executive Order"), which directed the medical director of Cook County Hospital to implement these recommendations. Neither the recommendations nor the Executive Order contained any provisions requiring the consent or notice of the potential fathers[1] of the

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[1] The court recognizes that the use of labels of woman, mother, father or child, concerning abortion is controversial. Many, including the plaintiff, may consider plaintiff as a "father" regardless of whether a birth has occurred. The court intends no

fetuses.[2] Neither did the recommendations or Executive Order require a judicial hearing in which the potential fathers or fetus' interests would be represented. On or about September 16, 1992, the County hospitals began performing abortions pursuant to the Executive Order.

Plaintiff John Coe ("Coe"), had a living child with Jane Doe ("Doe"), born prior to September 1995. Doe became pregnant a second time by Coe. In September 1995, Doe terminated this pregnancy through an abortion at Cook County Hospital, pursuant to the forgoing policy. Coe had no knowledge that Doe would obtain an abortion, received no notice of her intent to have the abortion, and did not give his consent for the abortion. Had he been given notice, Coe would not have consented. Coe also does not know the gestational age of the fetus at the time of the abortion. Coe, having timely filed the instant suit approximately eight months after the alleged violations occurred, has complied with the Illinois statutes of limitations applicable to civil rights actions or wrongful death actions against public officials. See 735

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disrespect to this position. However, mirroring the terminology of the Supreme Court in *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705, the court will refer to a man who has sired a fetus as a "potential father."

[2] The court takes judicial notice of Executive Order 92. The complaint alleges the Executive Order to not "allow or require" consent or notification of the potential father. In this regard, the complaint is somewhat inaccurate. The Executive Order does not speak to consent or notice at all, and cannot reasonably be construed to not "allow" the consent or notification of the potential father.

ILCS 5/13-202 (1992) (applying a two year statute of limitations to civil rights actions); 745 ILCS 10/8-101 (1992) (applying a one year statute of limitations for state claims against public officials).

Coe raises this putative class action in five counts. As a general matter, the complaint alleges that the abortion, and the Executive Order under which it was performed, violated his rights under the United States and Illinois Constitutions. The complaint asserts that the abortion: (1) violated his substantive due process rights under the Fourteenth Amendment by failing to require his notice or consent; (2) violated his due process rights under the Fourteenth Amendment by failing to provide notice or a hearing in which he could present his interests; (3) violated his equal protection rights under the Fourteenth Amendment because the abortion was performed pursuant to the pregnant woman's consent but not the consent of the potential father; (4) violated his fundamental rights under the Fourteenth Amendment to familial association and to procreate; and (5) violated the fetus' right to life under Illinois law in violation of the Fourteenth Amendment of the Illinois Constitution.

In count I, Coe seeks monetary damages for the County's alleged violation of the rights, privileges and immunities under the Fourteenth Amendment of potential fathers of fetuses aborted at Cook County Hospital in compliance with the Executive Order. Coe seeks these damages pursuant to 42 U.S.C. section 1983. In count II, he seeks monetary damages pursuant to section 1983 from Rothstein for her purported role in authorizing these same alleged violations. In count III, Coe seeks monetary damages, pursuant to section 1983, on behalf of the aborted fetuses

from the County for its alleged violation of the fetuses' constitutional right to life and association with their potential fathers. In count IV, he seeks monetary damages from Rothstein for the alleged violations of the fetuses' rights. Count V presents a pendant state law claim for wrongful death under a respondent superior theory against the County.

Defendants move to dismiss the complaint for failure to state a claim for which relief may be granted. With regard to the first two counts, defendants argue that any alleged constitutional interest of the potential fathers in either notification or consent is outweighed by the mother's reproductive rights under the Fourteenth Amendment. Defendants alternatively argue that the fathers have no standing to raise their claims. With regard to the second two counts, defendants contend that (1) fetuses do not have standing to raise a claim under section 1983, and (2) the fathers do not have standing to raise claims on behalf of the fetuses they sired under section 1983. With regard to all claims against defendant Rothstein in her individual capacity, the defendants further argue that she is protected by qualified immunity.

DISCUSSION

The court may not grant a motion to dismiss for failure to state a claim upon which relief may be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S.Ct. 99 (1957). The complaint must allege sufficient facts to outline the elements of the asserted cause of action. *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1984). All well-pleaded facts are

accepted as true, and the court will view those allegations, and reasonable inferences therefrom, in a light most favorable to the plaintiff. *Gomez v. Illinois State Bd. of Ed.*, 811 F.2d 1030, 1039 (7th Cir. 1987). Legal conclusions alleged in the complaint are not binding on the court. *Reichenberger v. Pritchard*, 660 F.2d 280, 282 (7th Cir. 1981). Finally, a court should not strain to imply inferences not apparent from the face of the complaint. *Coates v. Illinois State Bd. of Ed.*, 559 F.2d 445, 447 (7th Cir. 1977).

I. Federal Claims of Potential Father's Rights.

Coe pursues his section 1983 claims for violations of the Fourteenth Amendment under three related theories. First, Coe contends that the Executive Order violates the Equal Protection Clause by excluding the potential father from the process of considering abortion while including the pregnant woman in that process. Coe asserts two alternative arguments in support of his equal protection claim. In the first argument, Coe contends that the Executive Order is subject to strict scrutiny because the classification of potential fathers versus pregnant women impinges upon the potential fathers' fundamental rights. See *Plyler v. Doe*, 457 U.S. 202, 216, 72 L.Ed. 2d 786, 102 S.Ct. 2382. (1982). In particular, Coe argues that the Executive Order's failure to require the potential father's consent impinges upon his fundamental right to procreate under *Skinner v. Oklahoma*, 316 U.S. 535, 543-44, 86 L. Ed. 1655, 62 S.Ct. 1110 (1942) and his fundamental interest in the development of the fetus and future association with the child. See also *Eisenstadt v. Baird*, 405 U.S. 438, 446-47, 31 L.Ed. 2d 349, 92 S.Ct. 1029 (1972) (individuals have fundamental right to decide whether to use contraceptives); *Stanley v. Illinois*, 405 U.S.

645, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1972) (recognizing fundamental interest of unwed father in child he has sired and raised). In his alternative argument, Coe contends that, regardless of whether a potential father's fundamental interest is at stake, the Executive Order discriminates against him and other potential fathers on the basis of gender.

Second, although not directly discussed in his brief, Coe's complaint also appears to assert that the Executive Order denies a substantive due process right of the potential father in the development of the fetus. The court presumes that Coe generally looks to his fundamental rights analysis under equal protection for support of his substantive due process claim.

Third, Coe argues that the Executive Order deprives him of due process of law by denying him notice of, or a hearing considering, his interests before performing the abortion. In order for process to be due, the state must deny the plaintiff a liberty interest. Coe argues that a potential father has such a liberty interest in the full development and birth of the fetus. Cf. *Stanley*, 405 U.S. 645, 651-52, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (recognizing substantial interest of father in child he has sired and raised). But compare *Michael H. v. Gerald D.*, 491 U.S. 110, 123, 105 L.Ed. 2d 91, 109 S.Ct. 2333 (1989) (characterizing liberty interest considered in Stanley and related cases as derived primarily from sanctity of the family unit and not from a biological relationship plus established parental relationship). Coe notes that, even where liberty interests are not created by the Constitution, the due process clause protects certain liberty and property interests conferred by state law. See *Wolff v. McDonnell*, 418 U.S. 539, 557, 41 L.Ed. 2d 935, 94 S.Ct.

2963 (1974). In addition to provisions of Illinois law considering the fetus as a legal entity, Illinois law recognizes that a potential father may have a wrongful death claim for the destruction of a fetus he sired. See 740 ILCS 180/2.2.

A. Fundamental Right.

Coe first argues that the Executive Order discriminates against potential fathers in the course of impinging upon their fundamental interest in the development of the fetus. A public entity is generally authorized broad discretion to make distinctions in its treatment among people in its laws and regulations. See *Plyler*, 457 U.S. at 216. Such distinctions will not violate the equal protection clause unless they do not rationally relate to some legitimate government interest. *Id.* However, where the law or regulation distinguishes among persons upon the basis of a suspect classification or impinges upon a fundamental right, the court must apply far stricter scrutiny. *Id.* In particular, the distinction in the law must be narrowly tailored to serve a compelling state interest. See *id.* at 217. Where a state law impinges upon a fundamental right recognized under the Due Process Clause, it requires a similar analysis. See *Roe*, 410 U.S. at 155. Coe contends that the Executive Order's failure to require the consent or notice of a potential father, while requiring such consent from the pregnant woman, is subject to strict scrutiny because it impinges upon the potential father's fundamental interest in the development of the fetus and future relationship with the child.

Particularly when considering a novel claimed interest, the court must first look to the nature of the individual interest affected by the Executive Order in order to determine if strict

scrutiny is required. *Lehr v. Robertson*, 463 U.S. 248, 256, 77 L.Ed. 2d 614, 103 S.Ct. 2985 (1983) (due process); *Zablocki v. Redhail*, 434 U.S. 374, 383, 54 L.Ed. 2d 618, 98 S.Ct. 673 (1978) (equal protection). A man, and presumably a woman, has a fundamental interest to procreate that is impinged upon by involuntary sterilization. See *Skinner*, 316 U.S. at 543-44. Of course, the County's provision of abortion services neither sterilizes Coe nor directly prevents him from siring children in the future. See *Poe v. Gerstein*, 517 F.2d 787, 797 (5th Cir. 1975) (abortion of fetus does not impinge upon a man's right to procreate), aff'd, *Gerstein v. Coe*, 428 U.S. 901, 49 L.Ed. 2d 1205, 96 S.Ct. 3202 (1976). But this fact does not necessarily mean that a potential father has no constitutional interest in the development of the fetus.

The Seventh Circuit has recognized that a father may have some sort of substantive due process protection against the termination of his parental rights on a "bizarre", though not necessarily invidious or discriminatory, basis. See *Pena v. Mattox*, 84 F.3d 894, 898 (7th Cir. 1996). However, *Pena* considered the father's rights upon the birth of the child. Similarly, the precedent relied upon by *Pena*, as well as by *Coe*, only considered the parental rights of the father following the birth of the child. See *id.* at 897-98; see also *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24, 105 L.Ed. 2d 91, 109 S.Ct. 2333 (1989) (considering unwed father's limited liberty interests of child born into another marriage and with whom he had failed to develop any relationship over the years); *Quilloin v. Walcott*, 434 U.S. 246, 54 L.Ed. 2d 511, 98 S.Ct. 549 (1978) (affirming application of "best interests of child" standard denying unwed father veto over adoption of twelve year old child); *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1972)

(considering unwed father's liberty interests in care of child whom he supported and with whom he had cohabitated for years). These decisions did not consider a potential father's rights prior to birth. See *Casey*, 505 U.S. 833 at 895-96, 120 L.Ed. 2d 674, 112 S.Ct. 2791. In fact, the father's interest recognized by these cases depended upon more than a mere biological relationship between the father and child. See *Michael H.*, 491 U.S. at 133 & 142-43; *Caban v. Mohammed*, 441 U.S. 380, 389, 60 L.Ed. 2d 297, 99 S.Ct. 1760 (1979). It sprang from the biological connection between the father and child plus a developed and actual relationship.[3] See *Lehr v. Robertson*, 463 U.S. 248, 259-60, 77 L.Ed. 2d 614, 103 S.Ct. 2985 (1983). Moreover, these cases each only considered the father's liberty interests, which invoke only the procedural protections of due process. None considered a father's "fundamental right" in the child. See,

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[3] Speaking for four Justices, Justice Scalia more recently indicated that the liberty interest recognized in Stanley and related cases did not arise even from only the biological relationship in combination with an established relationship. *Michael H.*, 491 U.S. at 123-24. Rather, he considered these liberty interests as derived from the sanctity of the family unit. Justice Scalia appeared to begrudgingly admit that this may extend beyond the traditional married family. See *id.* at 123 n. 3. However, at least four of the remaining Justices appeared to assume something more than a biological link before inferring a protected liberty interest. See *id.* at 142-43 & n.2 (Brennan, J., dissenting) (identifying theme of precedent that biological link combined with a substantial relationship conferred a substantial liberty interest in unwed fathers); see also *id.* at 133 (Stevens, J.,concurring in judgment) (assuming that illegitimate father's record of support and relationship with child supported sufficient liberty interest to require procedural protections).

e.g., *Caban*, 441 U.S. at 394 n. 16 (explicitly declining to consider the substantive due process rights of the father); *Pena*, 84 F.3d at 898 (indicating father's protection against "bizarre" or irrational basis of termination of parental rights).

The Supreme Court has twice recognized some cognizable interest of a husband in the fetus. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895-96, 120 L.Ed. 2d 674, 112 S.Ct. 2791 (1992) (noting that a husband has a 'deep and proper concern and interest . . . in the growth and development of the fetus [he has sired with his wife]"; *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 69, 49 L.Ed. 2d 788, 96 S.Ct. 2831 (1976) (same). The Fourteenth Amendment confers a "right of the individual" to be free from governmental intrusion into matters so fundamentally personal and profound as "the decision whether to bear or beget a child." See *Eisenstadt v. Baird*, 405 U.S. 438, 453, 31 L.Ed. 2d 349, 92 S.Ct. 1029 (1972). In part, in light of this general right of privacy in such family and procreative matters and the enormity of the impact of such a decision on one's life, the Fourteenth Amendment protects the pregnant woman from state imposed obstacles that may unduly burden her decision to abort a nonviable fetus. *Casey*, 505 U.S. at 874. The biological connection of siring a child does provide some interest by virtue of the unique opportunity to develop the type of relationship that ultimately affords more grounded constitutional protections. See *Lehr*, 463 U.S. at 262. Therefore, a potential father's fundamental interests in procreation and the unique opportunity to form a future relationship with the potential child may create some interest in the fetus recognized under the Fourteenth Amendment. However, no precedent has indicated that these interests

provide a potential father with a fundamental right in the development of the fetus warranting strict scrutiny. Although the potential father's concerns and interests may be great, the pregnancy simply does not affect him in the same qualitative manner that it affects a woman. Consequently, the court expresses some doubt whether Coe has any fundamental right that the Executive Order may have infringed.

Assuming that a potential father does have a fundamental interest in the development of the fetus,[4] those interests remain outweighed by the pregnant woman's interests in choosing whether to terminate the pregnancy, or the state's interests in assisting the woman in exercising those interests. When the state performs the abortion as an agent of the pregnant woman, whatever rights a potential father may derive from his interests in the fetus are more circumscribed. In such circumstances, the pregnant woman's fundamental and constitutionally recognized interests in the future of the fetus, as well as her bodily integrity, are more profound. See *Casey*, 505 U.S. at 895-96; *Danforth*, 428 U.S. at 69.

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[4] Circumstances might arise where the potential father's interests are pitted against the interests of the state, but not those of the pregnant woman. For instance, if a pregnant woman was rendered brain dead by a tragic accident. The court is somewhat hesitant to conclude that a potential father would not have a fundamental interest in the development of the fetus at stake. In addition, the potential father's interests may be pitted against the state in the case of frozen embryos. Finally, the court cannot confidently say that the potential father would have no independent constitutionally protected interests at stake if he were to raise a suit in tandem with the pregnant woman's interests against an abortion compelled by the state.

Coe does not dispute that a woman's right to choose an abortion substantially outweighs the potential father's interests in notice, let alone consent, of the abortion of the fetus he sired. See *Casey*, 505 U.S. at 895-96; *Danforth*, 428 U.S. 52, 49 L.Ed. 2d 788, 96 S.Ct. 2831. The state may not require a pregnant woman to obtain the notice or consent of the putative father before obtaining an abortion. See *id*. Coe counters that the Supreme Court's balancing of interests established in *Casey* and *Danforth* are not applicable to the more limited right that he seeks. In those cases, the state had proposed a further reaching interest of potential fathers in consent before any abortion, not merely a potential father's right against an abortion performed by the state, itself. Coe stresses that the Due Process Clause provides a woman with no right to the provision of abortion services by the state. *Webster v. Reproductive Health Services*, 492 U.S. 490, 507-10, 106 L.Ed. 2d 410, 109 S.Ct. 3040 (1989). Rather, it only protects her from state intrusion pursuant to the imposition of substantial obstacles to her ability to choose an abortion. Consequently, he asks what interests the pregnant woman could have to be balanced against his own interests, no matter if limited, in the development of the fetus and potential future relationship with the child.[5]

However, the Due Process Clause provides the

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[5] In a strategy that may only be described as curious, counsel for the defendants has declined to file a brief replying to either Coe's assertion of a potential father's constitutional interests in the development of a fetus or Coe's innovative characterization of the proper balancing of constitutional interests. The court observes that the failure to do so appears to be a peculiar litigation tactic.

pregnant woman with no right to the provision of abortion services by any provider, whether public or private. See *id.* at 507-08. As Coe argues, it provides her with a right against intrusions by the state which impose a substantial obstacle to her ability to seek and obtain an abortion of a nonviable fetus. But the pregnant woman's particular right against state action is not at issue in the present case. Rather, the issue is the balancing of constitutionally recognized interests that are in conflict. The County's interest served by the Executive Order is to assist pregnant women in exercising their recognized liberty interests in choosing whether to terminate their pregnancy. These interests include her constitutionally recognized interests to control her body, her identity and the most critical and personal aspect of her life. Ultimately, it is these interests, implicit in the state's interest, that are weighed against Coe's asserted constitutional interests in the fetus. But the woman's lack of a constitutional right to the provision of abortion services by the state is irrelevant.

For instance, in *Casey* and *Danforth*, the Court never indicated that the husband's lack of a constitutional interest against state action was pertinent to the balancing of the husband and wife's interests. In each decision, the Court determined that the interests of the pregnant woman in obtaining an abortion outweighed the interests of the husband in obtaining a veto or notice. As noted, the Court appeared to recognize that the husband had important and cognizable interests at stake to be balanced against his wife's interests. See *Casey*, 505 U.S. at 895-96; *Danforth*, 428 U.S. at 69. As in the instant case, however, the husband's interest was only in the future association with the potential child after birth and not a fundamental right in the development of the fetus. Ultimately, the balance tipped in the wife's favor because the

effect of the pregnancy upon her is qualitatively more profound than upon the husband; not because only she faced the interference of the state. See *Casey*, 505 U.S. at 896-97; *Danforth*, 428 U.S. at 69; *id.* at 90. (Stewart, J., concurring).

The court recognizes that the Fourteenth Amendment permits the state to decline to perform services for the woman. *Webster*, 492 U.S. at 508-10. Thus, the County could have refused to abort Doe's pregnancy. But the County decided to provide abortion services for pregnant women such as Doe. The fact that a woman does not have an affirmative constitutional right to the provision of abortion services does not undermine a state's compelling interest in enacting a policy for her benefit in obtaining an abortion. The fact that a husband has no affirmative constitutional right to compel the state to require his consent before a fetus he sired is aborted does not undermine his constitutional interests in the development of the fetus when assessing the state's interests in such a law against the woman's right to choose. See 505 U.S. at 895-98, at 2830-31; *Danforth*, 428 U.S. at 69-71. The Fourteenth Amendment recognizes the enormous effect of pregnancy on the woman, and her consequent interests in bodily integrity that arise from the decision to terminate or continue the pregnancy. *Casey*, 505 U.S. at 852 & 896-97. These interests are so great as to prevent the state from imposing substantial obstacles on her ability to seek and obtain an abortion. As noted in *Casey* and *Danforth*, these interests in the pregnancy clearly outweigh the interests of the potential father. As her interests outweigh the potential father's, they provide the state with a compelling interest in assisting the woman in exercising this profound liberty interest without requiring the consent or notice of the potential father. The distinction between the pregnant individual and

the other potential parent in requiring consent is properly tailored to this interest. Consequently, the court finds that, even if the potential father has a fundamental right in the development of a fetus he has sired, the Executive Order still does not violate his equal protection or substantive due process rights.

B. Gender Discrimination

Coe also argues that the Executive Order impermissibly discriminates on the basis of gender. As the court finds that the Executive Order would pass strict scrutiny, it certainly passes the intermediate scrutiny required by gender discrimination. In addition, although the Supreme Court has raised some suspicions of classifications based upon presumptions about a parent's comparative role in the development of the child derived from the parent's gender, it only considered the roles of parents in the child's development, and not to inferences or conclusions concerning a potential parent's relationship to a fetus. See *Caban*, 441 U.S. at 389. In fact, the Court recognized that there are justifications for presumed difference in the roles that men and women will play in a child's life, but that these justifications quickly dissipate as the age of the child increases. See *id*. Where the fetus is not born or even viable, the distinctions between the pregnant woman's and potential father's interests in the fetus are clear. See *Casey*, 505 U.S. at 895-97.

In fact, despite its obvious effect, the Executive Order does not explicitly distinguish among individuals on the basis of gender but rather upon the condition of pregnancy. The Executive Order obviously permits the pregnant individuals

to receive an abortion. But it does not appear to require the consent or notice of any other non-pregnant individual, including the potential father. Whatever the merits of its position, in the context of equal protection claims, the Supreme Court still refuses to consider legal discrimination on the basis of pregnancy as gender discrimination. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 760, 122 L.Ed. 2d 34 (1993); *Geduldig v. Aiello*, 417 U.S. 484, 496-97, 41 L.Ed. 2d 256, 94 S.Ct. 2485 (1974).

C. Procedural Due Process

Coe also contends that the County's failure to provide potential father's with notice or hearing violates the Due Process Clause. When the state impinges upon an individual's protected liberty interest, the Fourteenth Amendment requires that it provide that individual with certain minimum procedural safeguards. See *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701 (1972).

As noted above, the court recognizes that a potential father may have some sort of constitutionally protected interest in the future development of the fetus and his future relationship with the child. However, whatever the nature of this liberty interest, it does not include the right to consent or notice before a pregnant woman elects and obtains an abortion. In the prior analysis, the court has determined that the state's failure to provide the potential father with notice or consent before performing an abortion for the pregnant woman does not violate equal protection or due process, even if his interest in the development of the fetus is considered fundamental. The state's compelling interest in permitting the woman to exercise her liberty interests in excluding the

potential father's input from such a decision leaves no legal substantive right for the potential father to vindicate through a hearing. See also *Michael H.*, 491 U.S. at 120-21 & 126 n.5. The woman's interests in her pregnancy outweigh the man's interests in the future development of the fetus. Because this balance tips in favor of the woman, the potential father's interests do not support any substantive right to notice of her decision or requirement of his consent. Consequently, when the state is acting on behalf of the pregnant woman, her interests support a state policy imposing an irrebuttable presumption against his potential liberty interests when she requests an abortion. In fact, if the state need not provide the potential father with notice, it clearly is not required by the Due Process Clause to provide him with a hearing to air his views to the pregnant woman. Accordingly the defendant's motion to dismiss is granted with respect to counts I and II.

II. Federal Claims on Behalf of Fetus.

In counts III and IV, Coe raises civil rights claims on behalf of the aborted fetus' for the deprivation of the fetus' purported constitutional right to life and association with their fathers. As an initial matter, potential fathers lack standing to sue on the behalf of their sired fetus' interests. Only the state may invoke state laws or regulatory measures intended to protect the interests of the fetus, or similarly invoke the power of the courts when those laws or regulations are subject to challenge. See *Diamond v. Charles*, 476 U.S. 54, 67, 90 L.Ed. 2d 48, 106 S.Ct. 1697 (1986); *Ragsdale v. Turnock*, 941 F.2d 501, 509-10 (7th Cir. 1991) (Posner, J., concurring); *id.* at 511 (Flaum, J., concurring) (agreeing that putative fathers lack standing to assert interests under Illinois statutes at issue); see also *id.* at 505 (indicating agreement

with Judge Posner's standing analysis).

Coe seeks to distinguish his claims because section 1983, and not the Illinois Abortion Law, is at issue. *Diamond* and *Ragsdale* each considered efforts to intervene, through actions on behalf of the rights of fetuses, in actions challenging state abortion regulations. In these cases, the only interests or rights of the fetus addressed were those protected by the state statutes and regulations. In the present case, Coe explains that he wishes to proceed on behalf of the fetuses' purported rights protected under the Constitution and section 1983. But neither the Fourteenth Amendment, nor through it, the First Amendment, confer any rights upon the unborn fetus. See *Roe*, at 158. Consequently, the court finds no particular due process or equal protection rights of fetuses on which the potential father may claim standing. To the extent that Coe seeks to pursue his own constitutional rights, the court has considered those claims in the preceding section. Accordingly, the defendants' motion to dismiss is granted with respect to counts III and IV.

III. Wrongful Death Claim

In Count V, Coe appears to argue Illinois has instituted just such a policy through its wrongful death statute by subjecting state entities to potential liability to potential fathers for abortions performed by the state without their consent or notice. See 740 ILCS 180/1 et. seq.[6]

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[6] 740 ILCS 180/1 provides a cause of action for the death of "a person" arising from a" wrongful act, neglect or of default." 740 ILCS 180/2.2 further provides in pertinent part: The state of gestation or development of a human being when an injury is

The court doubts that 740 ILCS 180/2.2 may be reasonably read to provide such a cause of action. The statute generally provides a cause of action to the potential father for an abortion that is not performed as "permitted by law" or without the "requisite consent." Accordingly, Illinois has permitted wrongful death claims against physicians who have caused the destruction of the fetus but were not acting as an agent for the pregnant woman. See, e.g., *Seef v. Sutkus*, 145 Ill. 2d 336, 583 N.E.2d 510, 164 Ill. Dec. 594 (Ill. 1991). A state is not permitted to render an abortion illegal because the provider did not require the notice or consent of the spouse. While the state may elect to adopt a regulation requiring such notice or consent itself, the court doubts that such a regulation would render the abortion as "not permitted by law" within the meaning of the statute. In light of the court's rejection of Coe's section 1983 claims, the source of the state proscription of abortions without spousal input is unclear.

Consequently, the court believes that Coe's claim calls for a novel interpretation of Illinois law that is best left to the judgment of the Illinois courts. In light of this fact, and the fact that the court has dismissed Coe's federal claims, the court declines to exercise subject matter jurisdiction over count V. Accordingly, count V is also dismissed for lack of jurisdiction. Having dismissed all five counts of Coe's

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caused, when an injury takes effect, or at death, shall not foreclose maintenance of any cause of action under [Illinois tort law].

There shall be no cause of action against a physician or a medical institution for the wrongful death of a fetus caused by an abortion where the abortion was permitted by law and the requisite consent was lawfully given.

complaint, Rothstein's qualified immunity defense and the county's potential supervisory liability are rendered moot.

Enter: Blanche M. Manning
United States District Court Judge

Dated: December 22, 1997

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[FILED
May 2, 1996]

JOHN COE, Individually on behalf of INFANT COE, and on behalf of ALL OTHERS SIMILARLY SITUATED,	) MAGISTRATE JUDGE GUZMAN
Plaintiff,	) No. 96-C-2636
v.	
COUNTY OF COOK and RUTH ROTHSTEIN, Individually and in her official capacity as Director of the BUREAU OF HEALTH SERVICES,	) JURY DEMANDED (AS TO DAMAGE ISSUES ONLY)
Defendants.	

CLASS ACTION COMPLAINT

Plaintiff, JOHN COE, by his attorneys RICHARD F. MALLEN & ASSOCIATES, LTD., complaining of Defendants COUNTY OF COOK and RUTH ROTHSTEIN, states as follows:

NATURE OF THE ACTION

1. This is an action for civil damages to redress deprivations, under color of law, of the rights, privileges and immunities secured by the Fourteenth Amendment to the United States Constitution. It is brought by and on behalf of the fathers of infants, and on behalf of the infants themselves who have been aborted at Cook County Hospital, for non-therapeutic or elective reasons within the first trimester of pregnancy. It is also brought on behalf of those fathers and infants for abortions performed during the second trimester of pregnancy, for claimed "therapeutic" reasons, which are actually not therapeutic.

JURISDICTION AND VENUE

2. This action is brought pursuant to Title 42 U.S.C. Sections 1983 and 1988. Jurisdiction of this court arises under Title 28 U.S.C. Sections 1331 and 1343. The court has pendent jurisdiction over ancillary state claims.

3. Venue is proper in the Northern District of Illinois, Eastern Division, as the actions and transactions complained of herein all occurred within this district.

PARTIES

4. Plaintiff, John Coe, sues under a pseudonym to protect his privacy. At all times relevant herein he was a male of majority age, a citizen of the United States and a resident of the State of Illinois, County of Cook.

5. Defendant County of Cook, is a Municipal

corporation formed under and existing by virtue of the laws of the State of Illinois. The County owns and operates Cook County Hospital, under the auspices of the Bureau of Health Services, County of Cook, State of Illinois.

6. Defendant Ruth Rothstein, at all times relevant herein, was and is the chief of the Cook County Bureau of Health Services. She is sued in both her official and individual capacities.

CLASS ACTION ALLEGATIONS

7. (a) Plaintiff brings this action as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

(b) The classes consist of *i)* the fathers of all infants aborted at Cook County Hospital for elective and non-therapeutic reasons since September 15, 1992 and *ii)* all infants aborted at Cook County Hospital for elective and non-therapeutic reasons since September 15, 1992.

(c) The class members are so numerous that joinder of all persons is impractical. Upon information and belief, in excess of 2,000 elective abortions are performed each year at Cook County Hospital. An unknown number of non-therapeutic abortions during the second trimester are also performed each year at the hospital.

(d) There are questions of law and fact common to the classes, which include: whether Defendant Cook County had a policy, custom and practice of performing elective abortions without the consent of or notice to the putative

fathers; whether Defendant Cook County had a policy, custom and practice of performing elective abortions without any type of hearing where the rights of the father and infant would be represented; whether the County had a policy, custom and practice of performing so called "therapeutic" abortions during the second trimester for reasons that were actually elective or non therapeutic; whether the conduct alleged herein violated the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. Section 1983; whether the supervisory Defendant herein, Ruth Rothstein, knew or reasonably should have known that the foregoing constituted a violation of the fathers' and infants' constitutional rights; whether Plaintiffs and members of the Plaintiff's class are entitled to an award of compensatory and punitive damages.

(e) The common questions of law and fact predominate over questions affecting only individual class members.

(f) Plaintiff will fairly and adequately protect the interests of all class member as he is a member of the class and his claims are typical of the claims of all class members. The Plaintiff is incensed at the treatment accorded class members and will aggressively pursue the interests of each of the classes. Plaintiff's interest in obtaining monetary damages for the violations of constitutional rights and privileges is consistent with and not antagonistic to those of any persons within the classes.

(g) A class action is superior to other available methods for the fair and efficient adjudication of this controversy in that: a multiplicity of suits and its consequent burden on the courts will be avoided; it would be virtually

impossible for all class members to intervene as party plaintiffs; upon adjudication of defendants' liability, claims of the class members can be determined by this court; Plaintiff is represented by attorneys with experience in the area of constitutional litigation.

COMMON ALLEGATIONS OF WRONGFUL CONDUCT

8. On March 5, 1992, former Cook County Board President Richard J. Phelan requested that Defendant Ruth Rothstein form a task force of health professionals to develop a plan for the restoration of elective abortions at Cook County Hospital.

9. The foregoing task force was formed, and, on June 16, 1992, the task force issued a report entitled COOK COUNTY HOSPITAL VOLUNTARY INTERRUPTION OF PREGNANCY PROGRAM TASK FORCE RECOMMENDATIONS. The recommendations in the report included providing elective abortions at Cook County Hospital through the first trimester of pregnancy. The report also provided for supposed "therapeutic" abortions through the second trimester of pregnancy when the pregnancy resulted from "rape or incest" or "... when continuation of the pregnancy is likely to result in the birth of a child with a severe fetal anomaly."

10. On June 18, 1992, former Cook County Board President, Richard J. Phelan issued executive order 92-1, which, among other things, directed the implementation of the recommendations of the task force, through the medical director of the hospital and other personnel of the hospital.

11. The foregoing task force recommendations and executive order 92-1 implementing those recommendations contain no provisions allowing or requiring the consent of or notice to the putative father of any infants that would be aborted at Cook County Hospital. There is no provision in the recommendations or executive order allowing for or requiring a hearing where the fathers' and infants' interests would be represented.

12. On or about September 16, 1992, Defendants began conducting elective and so called therapeutic abortions at Cook County Hospital, pursuant to the foregoing recommendations and executive order, through its agents and employees, all under color of law.

13. The foregoing policies, procedures, customs and practices of the Defendant Cook County have continued unabated and unchanged until the present time.

14. John Coe and Jane Doe are the parents of one living child born prior to September, 1995. Jane Doe is an actual person identified under a pseudonym to protect her privacy, and at all times relevant herein, was a female of a majority age. Jane Doe became pregnant with a second infant fathered by John Coe. During the month of September, 1995, she aborted this infant at Cook County Hospital, pursuant to the foregoing policies, custom and practices of the Defendant County. The exact gestational age of infant Coe at the time of the abortion is unknown to plaintiff.

15. Plaintiff John Coe had no knowledge that Jane Doe would obtain an abortion, did not consent to said abortion, and received no notice that said abortion would take

place from any person. Had plaintiff been notified, he would not have given his consent.

16. Defendants have violated the rights of Plaintiff and members of the classes, who are protected under the Fourteenth Amendment of the Constitution of the United States, and have violated 42 U.S.C. Section 1983, as follows:

a) The failure of the Defendants to obtain the consent or advice of the putative fathers prior to performing an elective abortion constitutes a gross invasion of Plaintiff's and other class member fathers' right to privacy, liberty, and substantive due process under the Fourteenth Amendment;

b) The failure by the Defendants to obtain the advice and informed consent of the putative father, while having the advice and informed consent of the mother, constitutes a gross invasion of the father's right to equal protection of the laws under the Fourteenth Amendment;

c) The failure by the Defendants to provide any notice to the putative father prior to performing an elective abortion and to provide for a hearing constitutes a gross invasion of the fathers' right to procedural due process under the Fourteenth Amendment;

d) The failure by the Defendants to obtain the advice and consent of the putative father prior to performing an elective abortion constitutes a gross invasion of the fathers' fundamental right to familial association and their right to procreate as protected by the Fourteenth

Amendment;

e) The failure by the Defendants to obtain the advice and consent of the putative father and to provide for a hearing prior to performing an elective abortion constitutes a deprivation of the infants' right to life as provided by Illinois law, without due process and in violation of equal protection of the laws under the Fourteenth Amendment;

f) The failure by the Defendants even with the consent of both the father and mother, to provide for a hearing or to obtain judicial approval prior to performing an elective abortion constitutes a deprivation of the infants' right to life as provided by Illinois law, without due process and in violation of equal protection of the laws under the Fourteenth Amendment.

g) The performance of abortions by County employees during the second trimester of pregnancy, or after viability, where the pregnancy resulted from rape or incest, or when the pregnancy is likely to result in the birth of a child with a severe fetal anomaly, constitutes a deprivation of the infant's right to life as provided by Illinois law without due process and in violation of equal protection of the laws under the Fourteenth Amendment.

17. At all times relevant herein, the Defendant Ruth Rothstein had the duty to direct, regulate and control the actions of her subordinates and employees under her supervision, so as to prevent those subordinate officials from

acting in a manner that deprives infants and putative fathers of their rights under the Constitution of the Laws of the United States and under Illinois law.

18. Defendant Ruth Rothstein individually, knew or should have reasonably known that performance of elective abortions at Cook County Hospital without the advice, consent, or notice to the putative fathers without a hearing or without obtaining prior judicial approval, violated the fathers and infants rights as protected by the Fourteenth Amendment to the United States Constitution and Illinois law.

19. Defendant, Ruth Rothstein, has failed to exercise adequate supervision over her subordinates, and failed to take steps to regulate and control the discretion of subordinate persons so as to prevent the conduct previously alleged. Defendant Rothstein has failed to provide or enforce lawful, clear and proper guidelines and procedures to assist subordinates to engage in only lawful acts.

COUNT I

COUNTY OF COOK - POLICY CLAIM - FATHERS' CONSTITUTIONAL RIGHTS

1-19. Plaintiff repeats and realleges Paragraphs 1 through 19 as and for Paragraphs 1 through 19 of Count I, as if fully set forth herein.

20. As a direct and proximate result of the policies, customs and practices of the Defendant County, and its employees acting in furtherance of said policies and practices, Plaintiff, individually as a father, and other class member

fathers have suffered violations of their rights, privileges and immunities under the United States Constitution and Illinois law, have suffered severe emotional distress, anguish, anxiety and injury, and a loss of their infant's society and companionship, due to the intentional misconduct of Defendants and Defendants agents and employees.

WHEREFORE, Plaintiff requests the following relief:

a) A finding by the court that this action should proceed as a class action under Rule 23 of the Federal Rules of Civil Procedure;

b) An award of compensatory damages to each Plaintiff and member of the class and against Defendant County of Cook in an amount in excess of $50,000.00;

c) Awarding Plaintiff and the class their costs of suit and attorney's fees under 42 U.S.C. Section 1988;

d) Any other or further relief that this court deems just.

COUNT II

DEFENDANT ROTHSTEIN - FATHERS' CONSTITUTIONAL RIGHTS

1-19. Plaintiff repeats and realleges Paragraphs I through 19 as and for Paragraphs 1 through 19 of this Count II, as if fully set forth herein.

20. The actions and omissions of Defendant Rothstein as alleged herein were undertaken and authorized by

Defendant Rothstein with a deliberate indifference to and a reckless disregard for the rights of the Plaintiff and class member fathers under the Fourteenth Amendment to the United States Constitution.

21. As a direct and proximate result of the acts or omissions of Defendant Rothstein, Plaintiff and other class member fathers have suffered violations of their rights, privileges and immunities under the United States Constitution and have suffered severe emotional distress, anguish, anxiety and injury, and loss of their infants' society and companionship due to the reckless and deliberately indifferent misconduct of Defendant Rothstein and her agents and subordinates.

WHEREFORE, Plaintiff requests the following:

a) A finding by the court that this action should proceed as a class action under Rule 23 of the Federal Rules of Civil Procedure;

b) An award of compensatory damages to each Plaintiff and member of the class and against Defendant County of Cook in an amount in excess of $50,000.00;

c) Awarding Plaintiff and the class costs of suit and their attorney's fees under 42 U.S.C. Section 1988;

d) An award of punitive damages for the misconduct of the Defendant in an amount in excess of $100,000.00;

e) Any other or additional relief that the court deems just.

COUNT III

COUNTY OF COOK - POLICY - INFANTS' CONSTITUTIONAL RIGHTS

1-19. Plaintiff repeats and realleges Paragraphs 1 through 19 as and for Paragraphs 1 through 19 of this COUNT III, as if fully set forth herein.

20. As a direct and proximate result of the policies, procedures and practices of the Defendant County of Cook, and its employees acting in furtherance of said policies and practices, Infant Coe and other infant class members similarly situated have suffered violations of their rights, privileges and immunities as provided for by Illinois Law and the United States Constitution and have suffered death, violations of their right to life, their fundamental right to associate with their fathers, and loss of enjoyment of life due to the intentional misconduct of Defendant and Defendant's agents and employees.

WHEREFORE, Plaintiff requests the following relief:

a) A finding by the court that this action should proceed as a class action under Rule 23 of the Federal Rules of Civil Procedure;

b) An award of compensatory damages to each Plaintiff and member of the class and against Defendant County of Cook in an amount in excess of $50,000.00;

c) Awarding Plaintiff and the class their costs of suit and attorney's fees under 42 U.S.C. Section 1988;

d) Any other or further relief that this court deems just.

COUNT IV

DEFENDANT ROTHSTEIN - INFANTS' CONSTITUTIONAL RIGHTS

1-20. Plaintiff repeats and realleges Paragraphs 1 through 20 of Count II as and for Paragraphs 1 through 20 of this Count IV, as if fully set forth herein.

21. As a direct and proximate result of the acts or omissions of Defendant Rothstein, infant Coe and other class member infants have suffered violations of their rights, privileges and immunities as provided for by Illinois law and the United States Constitution, and have suffered death, violations of their right to life, loss of enjoyment of life, and their fundamental right to associate with their fathers, due to the reckless and deliberately indifferent misconduct of Defendant Rothstein and her agents and subordinates.

WHEREFORE, Plaintiff requests the following relief:

a) A finding by the court that this action should proceed as a class action under Rule 23 of the Federal Rules of Civil Procedure;

b) Awarding compensatory damages to each Plaintiff and member of the class and against Defendant Rothstein in an amount in excess of $50,000.00;

c) Awarding Plaintiff and the class their costs of suit and attorney's fees under 42 U.S.C. Section 1988;

d) An award of punitive damages for the misconduct of the Defendant in an amount in excess of $100,000.00.

e) Any other and additional relief that the court deems just.

COUNT V

PENDENT STATE CLAIM - COUNTY - RESPONDEAT SUPERIOR, WRONGFUL DEATH

1. Plaintiff, John Coe, sues under a pseudonym to protect his privacy. At all times relevant herein he was a male of majority age, a citizen of the United States and a resident of the State of Illinois, County of Cook.

2. Defendant, County of Cook, is a Municipal corporation formed under and existing by virtue of the laws of the State of Illinois. The County owns and operates Cook County Hospital, under the auspices of the Bureau of Health Services, County of Cook, State of Illinois.

3. (a) Plaintiff brings this action as a class action pursuant to Rule 23(b) (3) of the Federal Rules of Civil Procedure.

(b) The classes consist of *i)* the fathers of all infants aborted at Cook County Hospital for elective and non-therapeutic reasons since September 15, 1992, and *ii)* all infants aborted at Cook County Hospital for elective and non-therapeutic reasons since September 15, 1992.

(c) The class members are so numerous that joinder of all persons is impractical. Upon information and

belief, in excess of 2,000 elective abortions are performed each year at Cook County Hospital. An unknown number of non-therapeutic abortions during the second trimester are also performed each year at the hospital.

(d) There are questions of law and fact common to the classes, which include: whether Defendant Cook County had a policy, custom and practice of performing elective abortions without the consent of or notice to the putative fathers; whether consent of the father was required before the County may perform an abortion; whether Plaintiffs and members of the Plaintiff's class are entitled to an award of compensatory damages.

(e) The common questions of law and fact predominate over questions affecting only individual class members.

(f) Plaintiff will fairly and adequately protect the interests of all class member as he is a member of the class and his claims are typical of the claims of all class members. The Plaintiff is incensed at the treatment accorded class members and will aggressively pursue the interests of each of the classes. Plaintiff's interest in obtaining monetary damages for the wrongful death of his infant is consistent with and not antagonistic to those of any persons within the classes.

(g) A class action is superior to other available methods for the fair and efficient adjudication of this controversy in that: a multiplicity of suits and its consequent burden on the courts will be avoided; it would be virtually impossible for all class members to intervene as party plaintiffs; upon adjudication of defendants' liability, claims of

the class members can be determined by this court; Plaintiff is represented by attorneys with experience in the area of class action litigation.

4. During the month of September, 1995, Jane Doe, a female of majority age, then the girlfriend of John Coe, was pregnant with an infant fathered by John Coe, and obtained an abortion at Cook County Hospital, pursuant to the foregoing policies, custom and practices of the Defendant County. She is an actual person identified under a pseudonym to protect her privacy.

5. Plaintiff John Coe had no knowledge that Jane Doe would obtain an abortion, did not consent to said abortion, and received no notice that said abortion would take place from any person.

6. The foregoing abortion was performed upon Jane Doe by persons employed by the County of Cook and were acting as agents of the County of Cook.

7. At all times relevant herein, it was the duty of the County to notify putative fathers and obtain their consent prior to performing an abortion and causing the wrongful death of their infant. This cause of action is brought pursuant to 740 ILCS 180/2.2.

8. Defendant County and its employees breached their duty to notify Plaintiff and obtain the consent of the Plaintiff, and other putative fathers previously mentioned herein, prior to performing abortions.

9. As a direct and proximate result of the

foregoing, Plaintiff's infant, and the infants of other putative fathers, were killed by employees and agents of Cook County Hospital, causing Plaintiffs loss of the society of their unborn infants.

WHEREFORE, Plaintiff requests the following relief:

a. A finding by the court that this action should proceed as a class action under Rule 23 of the Federal Rules of civil Procedure;

b. Awarding compensatory damages to each Plaintiff and member of the class and against Defendant County of Cook in an amount in excess of $50,000.00;

c. Awarding Plaintiff and the class their costs of suit;

d. Any other and additional relief that the court deems just.

Plaintiff, JOHN COE,

By: /s/_____
ROBERT J. DARGIS
Attorney for Plaintiffs

RICHARD F. MALLEN &
ASSOCIATES, LTD.
188 W. Randolph Street, Suite 1750
Chicago, Illinois 60601
312/346-0500